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NTSB Order No. EA-4871

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of December, 2000

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-15310
v.)	
)	
JACK ROGER OLDS,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William A. Pope, II, rendered after an evidentiary hearing on March 15, 1999.¹ By that decision, the law judge affirmed the Administrator's order suspending respondent's commercial pilot certificate for 180 days for

¹ An excerpt from the hearing transcript containing the law judge's initial decision is attached.

violations of sections 91.13(a) and 91.119(c) of the Federal Aviation Regulations ("FARs").² We deny the appeal.

The Administrator's amended order of suspension alleged:

1. At all times material herein you were and are the holder of Commercial Pilot Certificate number 311485156 and you are a Part 137 certificated restricted agricultural and pest pilot.

2. From on or about June 20, 1996 through on or about June 21, 1996, you operated, as pilot in command, civil aircraft N9255R, a CE-188, on an aerial agricultural application pre-flight and flight in the vicinity of Taylorsville, Kentucky for Over and Under Flying Service, Inc., of Madison, Indiana.

3. During the course of the above flights, you operated N9255R several times closer [than] 500 feet to people, residences and structures.

4. You operated N9255R at heights below electrical power lines and at eye-level in the vicinity of the above

² FAR sections 91.13 and 91.119, 14 C.F.R. Part 91, state:

Sec. 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

* * * * *

Sec. 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

* * * * *

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

* * * * *

described residences and property.

5. You operated N9255R in repeated and deliberate diving maneuvers approximately three times directly overhead persons at heights below that of electrical power lines, closer than 500 feet.

At the hearing, the Administrator presented numerous witnesses, including a Kentucky State Trooper, who testified that they observed respondent's aircraft on June 21, 1996. These witnesses generally recounted that respondent was flying at extremely low altitude, that the aircraft was so low that the witnesses frequently lost sight of it below the trees, that respondent appeared to be deliberately flying directly at persons, barns, houses, and animals, and pulling up at the last moment or flying in very close proximity to them, and that, at one point, respondent flew underneath electrical wires on the property of one of the witnesses.³ One witness took several pictures of respondent's flight operations. Respondent admitted that he was flying the aircraft, but claimed that he was engaged only in aerial pesticide application. Respondent also claimed the Administrator's witnesses were mistaken as to how close he flew to persons or structures, and denied flying over persons or structures, or underneath electrical wires.

The law judge, after noting that this case "turns almost entirely on credibility issues," credited the testimony of the

³ Several witnesses described respondent as "jumping" over their homes, meaning that his aircraft was so low as to require a momentary climb to clear the structure, followed by a subsequent descent.

Administrator's witnesses. In making this credibility determination, the law judge stated that none of the Administrator's witnesses knew respondent or had any interest in the outcome of the case, there were no prior instances or complaints of low flights in the area, the witnesses were in a position to observe the flights they described, and their accounts were reasonable and corroborated each other.⁴ Initial Decision ("I.D.") at 632-633. The law judge further stated that "having observed [respondent] as he testified, I found him to be somewhat evasive, and less forthcoming and candid than the witnesses called by the Administrator[.]" I.D. at 633.⁵ The law judge concluded that the Administrator proved by a preponderance of the evidence that respondent operated his aircraft numerous times at less than 500 feet from persons and property, that this created "specific endangerment" and "exhibited a careless or reckless disregard for the safety of the life or property of

⁴ We discern no error in the law judge's consideration of the fact that the Administrator's witnesses were disinterested, for it is clear from his decision that the most important aspect of their testimony was that they consistently described a similar version of events.

⁵ Although the law judge credited the Administrator's witnesses, he nonetheless found, despite the contrary testimony of the percipient witnesses, that the Administrator did not prove by a preponderance of the evidence the allegation that respondent flew beneath electrical wires. He based this decision in part on his personal observation of the site and the testimony of an FAA inspector who testified that such a maneuver would have been nearly impossible in at least one of the alleged instances, and concluded that the Administrator's percipient witness must have suffered an error of perception in this regard. I.D. at 635-637.

others[.]" I.D. at 643.⁶ He therefore upheld the violations of FAR sections 91.13(a) and 91.119(c), and, after noting the "particular egregious[ness] of the multiple low flights, especially those directly over persons, upheld the 180-day suspension. I.D. at 644.

On appeal, respondent attacks the law judge's decision by arguing that his factual findings were "inconsistent, erratic and illogical," and that the "inconsistencies and errors in the testimony upon which he relied are such that this testimony is not reliable, does not have probative value and is not therefore substantial so as to sustain the Administrator's burden of proof."⁷ Respondent's Brief at 2.⁸ We disagree, as our

⁶ FAR section 137.49, 14 C.F.R. Part 137, states:

Sec. 137.49 Operations over other than congested areas.

Notwithstanding Part 91 of this chapter, during the actual dispensing operation, including approaches, departures, and turnarounds reasonably necessary for the operation, an aircraft may be operated over other than congested areas below 500 feet above the surface and closer than 500 feet to persons, vessels, vehicles, and structures, if the operations are conducted without creating a hazard to persons or property on the surface.

The law judge found, after noting that several of the farms where percipient witnesses were located were "at least one-quarter mile from the nearest tract of land over which the respondent conducted aerial spraying applications," that the low flights were not necessary for his spraying activities. I.D. at 640-641.

⁷ Respondent also argues that the law judge erred by applying FAR section 91.119(c) instead of FAR section 137.49. It is clear from the law judge's decision, however, that he considered the provisions of FAR section 137.49, but rejected them because he determined that respondent's low flights in close proximity to
(continued . . .)

assessment of the evidence is somewhat different than respondent's.

In our review of the hearing record, we necessarily defer to credibility determinations because only the law judge is present to observe subtleties such as a witness's intonation and demeanor. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986) (deference to credibility determinations, unless shown to be arbitrary or capricious); Chirino v. NTSB, 849 F.2d 1525 (D.C. Cir. 1988) (the Board should reverse a law judge's findings when a witness's testimony is "inherently incredible"). This case involves a classic credibility issue -- in that respondent claims he didn't perform the maneuvers ascribed to him, while the Administrator's witnesses said he did. We see no basis to

(continued . . .)

persons, animals and structures were not only, as respondent testified, not necessary to his aerial application, but, even if they could be deemed to have been necessary, they were nevertheless such that they created "a hazard to persons or property on the surface." Based on the credited testimony, and the rationale articulated by the law judge, we find no error in this determination. See Administrator v. Lucke, 5 NTSB 1495, 1497 (1986) (stating agricultural aerial application not a defense to flights 20 feet above houses because record showed such close flight was unnecessary, and, elsewhere, stating that "hazard" for purposes of section 137.49 means an identifiable and specific endangerment).

⁸ Respondent has also submitted a Motion for Leave to File A Reply Brief, opposed by the Administrator, and provisionally supplied a Reply Brief. Respondent argues that the Reply Brief "is necessary to address important arguments and factual characterizations raised in the Administrator's [Reply] Brief." We have the entire record, including the transcribed hearing testimony, before us. We therefore strike respondent's Reply Brief from the record for failure to show good cause for its submission. See 49 C.F.R. § 821.48(e).

overturn the law judge's credibility decision in favor of the Administrator's witnesses' version of events. It is clear from the hearing transcript that although the Administrator's witnesses may have exaggerated distances, and, at times, may have misperceived certain details, they consistently testified to maneuvers, denied by respondent, performed in extremely close proximity to persons, structures, and animals.⁹ Even if it is assumed that their estimates, as lay witnesses, were somewhat exaggerated, they without doubt collectively described low flights well outside of the FAR-prescribed flight envelope. More importantly, the law judge was obviously aware of the witnesses' limitations, and factored this into his assessment of their testimony. Respondent's insistence that these witnesses were merely startled by a loud aircraft, and therefore misperceived how close his aircraft flew to persons and structures, is not a sufficient basis for us to overturn the law judge's credibility

⁹ Respondent also argues that the Administrator's witnesses made other errors of perception, such as when several of the witnesses testified to not observing respondent flying in the area where he undisputedly was performing his aerial application, and claims that the law judge failed to consider these flaws in their testimony. The argument is misplaced, however, for the law judge did not uniformly credit every detail of the Administrator's witnesses' testimony, but, rather, credited their general and collective description of the events related to the alleged violations. Moreover, respondent does not attempt to explain why it is unreasonable for witnesses concerned about low flights to have less recall of other less memorable details of respondent's activities on June 21, 1996. We cannot conclude that the witnesses' testimony was rendered inherently incredible by these inaccuracies, which were of minor focus during the hearing, or that the law judge somehow erred in evaluating their testimony in its entirety.

finding in favor of witnesses who uniformly described intentional buzzing maneuvers.¹⁰

In sum, having reviewed the record in its entirety, we discern no error that would compel a reversal of the law judge's credibility-based decision.¹¹

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

¹⁰ We are also not persuaded by respondent's argument that the law judge "erroneously and inconsistently credited" the "grossly exaggerated and inherently incredible versions of events" testified to by the Administrator's witnesses. Respondent's Brief at 12. Respondent argues that just as the Administrator's witnesses were found to be mistaken as to whether respondent flew underneath electrical wires, the law judge should have found that these witnesses were also mistaken as to their estimates of his aircraft's proximity to persons and property. We see no error in the law judge's evaluation of the factors bearing on the witnesses' ability to accurately describe the aircraft's movements at various points. Cf. Administrator v. Finnell, NTSB Order No. EA-4264 at 2 (1994) ("**These and other matters respondent raises remain credibility questions ... and looking at the evidence overall rather than minute parts of it, the overwhelming weight of the evidence supports [the law judge's findings]**").

¹¹ Respondent's argument that the law judge impermissibly established an unassailable credibility standard against respondent when he noted that respondent "had a very evident interest in the outcome of the case and a reason to fabricate his testimony," ignores his further observation that respondent's self-interest "does not necessarily make him an untruthful witness." I.D. at 633. Similarly, we do not agree that the law judge mistakenly found respondent's testimony to be inconsistent with that of the Kentucky State Trooper. The law judge did state that respondent's testimony "as to how he conducted his flight operations ... is somewhat in conflict with the observations of the Kentucky State Trooper who described observing respondent's aircraft making almost straight up climbs, whereas the respondent described them as much less than vertical[.]" I.D. at 634. However, the law judge reasonably evaluated the differences by observing that while respondent's aircraft "probably cannot" climb vertically it can be "perceived as doing that from the ground." I.D. at 634-635.

2. The law judge's decision is affirmed; and

3. The 180-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹²

HALL, Acting Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

¹² For the purposes of this order, respondent must physically surrender his airman certificate(s) to an appropriate representative of the FAA pursuant to FAR § 61.19(f).